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TEXT CITED.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1967

NO. 158

FLEMING SMITH,

Petitioner,

vs.

ILLINOIS,

Respondent.

(On Writ of *Certiorari* to the Appellate Court of Illinois, First District.)

BRIEF FOR RESPONDENT.

QUESTION PRESENTED

Whether the Constitution requires that the true identity and present address of a governmental informant be disclosed on cross examination?

STATEMENT OF FACTS

The facts are set out in the opinion below and to the extent that petitioner's Statement is contested the appropriate facts will be asserted in the pertinent sections of the Argument.

SUMMARY OF ARGUMENT

The name and address of the informant herein were not necessary or essential to the defense of the accused and hence were not constitutionally required to be disclosed to the accused.

ARGUMENT

I.

THE STATE HAS THE PRIVILEGE OF NON-DISCLOSURE OF THE IDENTITY OF AN INFORMANT WHERE THE IDENTITY IS NOT ESSENTIAL TO THE DEFENSE OF AN ACCUSED.

Governmental prerogatives include the privilege to protect the identity of persons who have furnished information of violations of law to officers charged with the enforcement of law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of every citizen to inform law enforcement officials of the commission of crimes and by preserving their identity, encourages them to perform this obligation to society. *McCray* v. *Illinois,* 386 U.S. 300; *Roviaro* v. *United States,* 353 U.S. 53; *Scher* v. *United States,* 305 U.S. 251; *In re Quarles and Butler,* 158 U.S. 532; *Vogel* v. *Gruaz,* 110 U.S. 311.

In order that the various federal, state and local law-enforcement agencies may properly preserve the rights and privileges of its citizens, they are required to rely upon information supplied to them by informers. (Harney and Cross, *The Informer in Law Enforcement,* (1960) pp. 6-12). It is difficult to characterize the benefit of society occasioned by this flow of information in a mere numerical or percentile quotation. But we believe that this Court is cognizant that this aspect of crime detection provides a significant portion of arrests and convictions

of serious crimes throughout our country. *McCray* v. *Illinois,* 386 U.S. 300; *Lewis* v. *United States,* 385 U.S. 206. Not only is the use of the informer helpful but perhaps it can be characterized as an integral instrument to maintain the peace and dignity of a community and secure the citizenry in the exercise of their constitutionally guaranteed rights.

Specifically, if we reduce the question in issue to a single informant, it is apparent that if his identity is revealed to the criminal element, the law-enforcement agencies have lost the use of a valuable asset. The individual informant will henceforth be foreclosed from gathering information which would be necessary or helpful to the police. (Harney and Cross, *The Informer In Law Enforcement,* (1960) p. 63).

The major danger to which this informant would be exposed, if his identity were revealed, is the retaliation which would befall him by the criminal elements who despise and fear him. (Harney and Cross, *The Informer In Law Enforcement,* (1960) p. 4). The decisions of our courts are replete with recognition of the fact that an informer literally risks his life by volunteering information to law-enforcement authorities.[1]

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[1] *United States* v. *Howard,* 228 F. Supp. 939. (U.S. D.C., Nebr. 1964); *United States* v. *Saunders,* 325 F. 2d 840 (C.A. 6th, 1964); *Ferina* v. *United States,* 302 F. 2d 95, (C.A. 8th, 1962) *cert. denied sub. nom.; Cardarella* v. *United States,* 371 U.S. 819; *United States* v. *Paroutian,* 319 F. 2d 66, (C.A. 2nd, 1964), *cert. denied,* 375 U.S. 981 (No. 540 Misc.); *United States* v. *Bando,* 244 F. 2d 833, (C.A. 2nd, 1957), *cert. denied,* 355 U.S. 884; *Carbo* v. *United States,* 288 F. 2d 686 (C.A. 9th, 1961)) *cert. denied,* 365 U.S. 861; *Carbo* v. *United States,* 82 S. Ct. 662,

Mr. Justice Clark, in *Rovario* v. *United States,* 153 U.S. 53, took cognizance of this situation and observed (p. 67):

> "Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removed, once visited upon the informer Larunda, has been found obsolete."

In *Schuster* v. *City of New York,* 5 N.Y. 2d 75, 154 N.E. 2d 534 (C.A. N.Y. 1958), the Court after taking cognizance of the death of an informant, discussed the possibility that not only does a governmental agency have a moral obligation to protect an informant but may have a duty under law to do so.

It logically follows and is well accepted that informers will be unwilling to expose themselves to the aforementioned dangers, by furnishing information, if disclosure of their identity is required. A rule of law which would require disclosure of an informer's identity where not required for the petitioner's defense, would mean the immediate loss of practically all existing and potential informants to the direct detriment of society.

The People of the State of Illinois submit that the informant is an absolute necessity for an effective control of crimes involving narcotics. In the narcotic field, as in any crime where we are confronted with a willing victim, there are usually no complaining witnesses and the only adequate manner in which the police can apprehend and convict violators is through the use of information supplied by confidential informants. The traffickers in narcotics are universally unwilling to deal with a stranger, and the difficulties of the law enforcement

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7 L. Ed. 2d 769, review denied, 369 U.S. 868); *Odom* v. *United States,* 116 F. 2d 996, (C.A. 5th, 1941), reversed 313 U.S. 554.

agent to gain the confidence of an individual engaged in this enterprise can only be characterized as nearly impossible. (Harney and Cross, *The Informer In Law Enforcement* (1960) pp. 18-19).

Mr. Justice Clark further observed in *Rovario* v. *United States*, 353 U.S. 53 (p. 66):

> "First, it is well to remember that the illegal traffic in narcotic drugs poses a most serious social problem. One need only read the newspaper to gauge its enormity. No crime leads more directly to the commission of other offenses. Moreover, it is a most difficult crime to detect and prove. Because drugs come in small pills or powder and are readily packaged in capsules or glassine containers, they may be easily concealed. They can be carried on the person or even in the body crevices where detection is almost impossible. Enforcement is, therefore, most difficult without the use of 'stool pigeons' or informants."

The governmental privilege is therefore of great importance and should be, respondent submits, given cognizance wherever possible. This Court has said:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. (*Rovario* v. *United States*, 353 U.S. 53, 62.)

The People of the State of Illinois submit that the specific question presented in this cause, whether the right of the petitioner to defend himself has been un-

duly restricted by the failure to disclose the true identity and address of the informant, ~~on~~ cross-examination must be determined by applying the theory of "Balancing of Rights" in light of the facts and circumstances attendant to this case.

II.

THE RULING OF THE TRIAL JUDGE SUSTAINING AN OBJECTION TO THE DISCLOSURE OF THE NAME AND ADDRESS OF THE INFORMANT WAS PROPER FOR IT DID NOT DEPRIVE THE PETITIONER OF A FULL AND FAIR OPPORTUNITY TO DEFEND HIMSELF.

James Jordan, a paid police informer, participated in a controlled sale of narcotics with the petitioner on February 28, 1964 (Tr. pp. 44-51). At the trial the prosecution produced Jordan as a witness and he testified to the circumstances surrounding the sale (Tr. pp. 6-12). On cross examination he admitted prior convictions (Tr. pp. 13-14); that he was an addict (Tr. pp. 13-14); that he had pending charges against him (Tr. p. 42); and that he had received funds as a police informer (Tr. p. 25).

The only objections to questions on cross examination which were sustained pertained to Jordan's correct name and present address (Tr. pp. 15-16).

The petitioner contends that the failure to divulge James Jordan's true name and present address is a violation of the petitioner's constitutional rights under the Fourteenth and Sixth Amendments to the Constitution of the United States. This contention is predicated upon the assumption that the right of confrontation and cross-examination is absolute and unfettered. This contention respondent submits completely ignores the governmental privilege of non-disclosure.

It is submitted that justice would best be served in this cause or in any cause where a police informant is involved if the principle of balancing is applied. To determine in a particular case what action is reasonable and thus whether due process has been complied with, the need of the government to act as it did should be balanced against the harm resulting to the individual from the action taken.

The question presented here has not been resolved by this Court. The balancing theory has, however, been applied for example by lower courts to the conflict between the right of cross examination and the privilege against self-incrimination. In *United States* v. *Cardillo,* 316 F. 2d 606, (C.A. 2d Cir. 1963) the court said:

> "Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. E. g., *Alford* v. *United States, supra; United States* v. *Masino,* 2 Cir. 1960, 275 F. 2d 129; *United States* v. *Lester,* 2 Cir. 1957, 248 F. 2d 239. However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely

collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States* v. *Kravitz,* 3 Cir. 1960, 281 F. 2d 581; *Hamer* v. *United States,* 9 Cir. 1958, 259 F. 2d 274; *United States* v. *Toner,* 3 Cir. 1949, 173 F. 2d 140. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part, *Montgomery* v. *United States,* 5 Cir. 1953, 203 F. 2d 887; cf. *United States* v. *Andolschek,* 2 Cir. 1944, 142 F. 2d 503; *Stephan* v. *United States,* 6 Cir. 1943, 133 F. 2d 87; *United States* v. *Keown,* W.D. Ky. 1937, 19 F. Supp. 639."

Thus where the privilege of self-incrimination was invoked by a witness on cross examination there is little danger of prejudice to the defendant where the privilege is being invoked only as to matters of credibility. See also *Coil* v. *United States,* 343 F. 2d 573 (C.A. 8th 1965); *United States* v. *McFarland,* 371 F. 2d 701 (C.A. 2d 1966).

The reasoning of *Cardillo* can be applied to the case at bar. The restrictions placed upon the cross examination herein dealt only with the question of credibility and thus the trial court was properly within its discretion in permitting the State to invoke the governmental privilege.

The thrust of petitioner's argument is that he could not effectively attack the credibility of the informer without the true name and present address of the informer.

It is important to note, however, that on cross-examination the informer admitted that he was presently an addict (Tr. pp. 13-14); that he had prior convictions for

larceny and burglary (Tr. pp. 13-14); that he presently had a criminal charge pending against him (Tr. p. 42); and, that he had been paid (Tr. p. 25). By his own admission, therefore, his credibility was called into question. Moreover, his entire testimony, including the facts and circumstances of the commission of the crime, was corroborated by the police officers (Tr. pp. 44-73), whose testimony was in no way impeached.

Also of significance, the attorney for petitioner stated in open court that he knew the informer and had on a prior occasion represented him. Thus it can be properly assumed that if there were additional facts which may have reflected adversely upon James Jordan's credibility, such facts were readily available to the defense.

The disclosure of the informer's true name and present address would be of little, if any, benefit to the petitioner, while on the other hand the benefit to society is obvious.

Petitioner cites *Roviaro* v. *United States,* 353 U.S. 53 to support his allegation that the State can not attempt to invoke its governmental privilege of non-disclosure, even in a limited application, where it has produced the informer at the trial. In *Roviaro* this Court in its supervisory power held that the identity of an informer is required to be divulged or produced where he is the sole participant other than the accused and the charge is not mere possession.

The State of Illinois has we submit, fully complied with the requirements of *Roviaro.* The informer, Jordan, was produced at the trial, he testified, and was subjected to cross examination. *Roviaro* does not require, we further submit, that the right of cross examination and confrontation be absolute and unfettered.

Petitioner further relies upon *Pointer* v. *Texas,* 380 U.S. 400 to support the contention that the cross examination must be unfettered. *Pointer,* however, stands for the

proposition that the Sixth Amendment rights are incorporated into the Fourteenth Amendment to the Constitution of the United States and therefore applicable to the States. *Pointer* does not discuss the scope of cross examination presented here which is required under the Sixth Amendment.

The petitioner also cites *Alford* v. *United States,* 282 U.S. 687, as authority for the proposition that the defense is entitled to the real name and present address of a witness. *Alford* is not applicable to this case for the objection therein to the question seeking this information was predicated upon whether it was relevant and not upon a right or privilege.

In the case at bar it is important to law enforcement authorities of the State of Illinois that all actual and potential informers know and understand that the authorities are attempting to protect them.

As applied to James Jordan, if his name and present address were divulged, retaliation may have followed not only for his testimony in this case but in the cases in which he had previously testified and other pending cases in which he admitted he had participated. The reasoning set forth in the *Cardillo* case permitting the balancing of the rights of the accused and that of the witness for the State where only the credibility of the witness could be affected is, we submit, sound. Taken with the facts in this case, it is apparent that the principle of balancing should and must be applied in favor of the governmental privilege of non-disclosure.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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